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No. 80-46

Supreme Court of the United States

October Term, 1979

DOMINIC PILOTTI,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Question Presented

Whether the detaining of a cab in which petitioner sat and the seizure of a pistol under petitioner's coat which rested on the seat next to him constituted an illegal search and seizure.

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Preliminary Statement

This is a petition for a writ of certiorari to review the order of the New York Supreme Court, Appellate Division, First Department, entered December 20, 1980 which affirmed an April 3, 1978 judgment of the Supreme Court of the State of New York, Bronx County, convicting petitioner of the crime of Criminal Possession of a Weapon in the Third Degree, and sentencing him to a term of from two-and-one-half to five years imprisonment.

Petitioner is presently incarcerated pursuant to the above sentence, and another indeterminate sentence of from 11 to 22 years imprisonment imposed on an unrelated homicide conviction.

Statement of the Case

After a New York State trial court judge denied his motion to suppress a gun discovered in his possession, petitioner pleaded guilty to Criminal Possession of a Weapon in the Third Degree. This conviction was affirmed by the New York State Supreme Court, Appellate Division, and leave to appeal to the New York State Court of Appeals was denied. The pertinent facts of the instant case are as follows:

On April 9, 1977, at about 9:30 a.m., Detective **Douglas Pace** and his partner, Police Officer **Frank Longo**, were on routine patrol in their radio car in Bronx County when they received information concerning a shooting (Pace: 56; Longo: 56). The report stated that there was a shooting at "Boston and Mace," and that the people who had done the shooting were four male Hispanics who fled the scene in a green Pontiac stationwagon bearing New York license plates 232XDP (Pace: 23; Longo: 75). This report had come from a Con Edison employee named R. V. Hardie. This was substantiated by the introduction into evidence of Mr. Hardie's pay stub, on which Mr. Hardie had written the license plate number (Pace: 39).* The officers returned to their stationhouse about 10 minutes after hearing the report, where they ran a license plate check and determined that the car was registered to Barbara Caggiano of 2517 Radcliff Avenue (Longo: 75). This plate check took about one or two minutes, after which the officers made the five-minute ride to 2517 Radcliff Avenue (Place: 29).

* Although it is not clear on the record, it is apparent that Mr. Hardie witnessed the shooting and turned over his pay stub either to officers on the scene or at the stationhouse.

When the officers arrived at the address they saw the car described in the radio alarm, bearing the same license plate, parked in front (Peace: 6; Longo: 58). The building at 2517 Radcliff Avenue was a three-story dwelling with a number of apartments (Longo: 77). The officers positioned their car about 55 or 60 yards from the front door of the house and kept the area under surveillance, as surreptitiously as possible, from their marked police car (Pace: 6). At this time they radioed for assistance from plainclothes officers (Peace: 6; Longo: 59). After 45 minutes of observation, the officers saw a man, not petitioner, stick his head out of the door. The man looked both ways down the street before exiting from the doorway (Longo: 59-60). Then petitioner, accompanied by the man who checked the street, and a third man, emerged from the house. From their observation post 60 yards away, both officers believed that the three men were Hispanic (Pace: 11-12; Longo: 59-67).

As he left the house, petitioner walked past the station-wagon and got into a cab. Petitioner's two companions walked south on Radcliff Avenue toward the patrol car (Pace: 12). Meanwhile, the officers pulled their car across Radcliff Avenue which prevented the cab from moving from the spot where appellant got in (Longo: 61; Pace: 42). The officers then alighted from their patrol car; Police Officer Longo approached petitioner and Detective Pace approached the other two men (Pace: 14; Longo: 61).

Pace approached the men with his gun halfway out of his holster and inquired, "Where are you going—where are you coming from?" One of the men, later identified as

Alfred Peruso, replied "From down the block." The other man, later identified as Louis Giangetti, would not answer when asked his name (Pace: 15). At that moment a member of the Anti-Crime Unit, Police Officer Jantz, came up to Detective Pace and said, "Watch the little guy. I locked him up with a gun before. Be careful" (Pace: 15). Pace then holstered his gun, frisked Giangetti, and found a loaded .32 caliber revolver and a black jack in his rear pocket. Peruso had no weapons on him (Pace: 34).

After a quick check to see if his partner needed assistance, Officer Longo walked over to the cab, which was standing about five yards in front of the radio car (Longo: 81). Officer Longo went over to the rear passenger door of the cab, with his gun held at his side, opened the door where appellant sat with his white fur coat on the seat next to him and asked him "Will you please exit the vehicle?" Petitioner just looked at Longo and said nothing. Officer Longo repeated his request a second time and petitioner said "Let me get my coat." Longo replied, "Don't touch anything, just let me see your hands and just step out." Petitioner complied with this request and got out of the cab (Longo: 81; Pace: 36).

Officer Longo escorted petitioner to the front of the cab where they were met by members of the back-up unit (Longo: 82). Then Officer Longo returned to the cab for the purpose of picking up petitioner's coat (Longo: 125-126). As he did so he felt a hard object under the coat. When he lifted the coat he found, on the seat, a loaded .357 Magnum revolver wrapped in a dishcloth (Longo: 82; Pace: 35).

Petitioner was then placed under arrest for possession of the gun.

ARGUMENT

POINT

No important issue of federal law is involved.

The instant case presents a search and seizure question which is neither novel nor important enough to merit this Court's review.

Petitioner calls upon this Court to review an affirmed factual determination of a state trial court. However, this Court has stated, "We do not grant a certiorari to review evidence and discuss specific facts." *United States* v. *Johnston,* 268 U.S. 220, 227 (1924). *See also Graver Mfg. Co.* v. *Linde Co.,* 336 U.S. 271, 275 (1949). In fact, commentators have noted:

> Apart from cases dealing with federal and state statutes, review is often sought of decisions which deal with various other matters of constitutional law, such as the application of the full faith and credit clause and the search and seizure provision of the Fourth Amendment to particular situations. But the presence of such issues, without more, is not enough to warrant review by certiorari. The issues must be novel, unsettled or important, a conflict of decisions must exist, or the law on the matter must be such as to warrant further consideration. *Supreme Court Practice,* Stern and Gressman, 1969 at page 169.

This comment is particularly apt in the instant case where the issue concerns the sufficiency of the predicate for

police action. This Court has specifically held on many occasions that striking a balance between police behavior and Fourth Amendment rights must be developed ". . . in the concrete factual circumstances of individual cases." *Terry* v. *Ohio,* 392 U.S. 1, 31 (1968); *Camara* v. *Municipal Court,* 387 U.S. 523 (1967). In the case at bar we have a fact pattern which can be, and has been below, decided on the basis of constitutional principles set forth in cases decided by this Court. This case does not present any novel theory. Nor does it present any opportunity for this Court to settle an unsettled area of the law. In short, this is a matter which should be left to the court below.

Further, this case was correctly decided. In the instant case, the officer's actions were reasonable and, therefore, the seizure of this weapon in no manner infringed on petitioner's Fourth Amendment rights. In this case, the combination of circumstances clearly warranted the restrained, limited intrusion by the investigating police officers, which resulted in the discovery of petitioner's weapon.

In evaluating police citizen encounters one must:

> . . . consider first whether or not the police action was justified at its inception and secondly whether or not that action was reasonably related in scope to the circumstances which rendered its initiation permissible.

People v. *DeBour,* 40 N.Y. 210 (1975).

In other words one must:

> examine the predicate for the police action and then determine whether or not that predicate justified the extent of the official intrusion on the individual. Thus, the predicate established defines the scope of permissible police conduct.

People v. *Stewart,* 41 N.Y.2d 65, 66 (1976).

The above standard articulated by the New York State Court of Appeals and made part of New York's Criminal Procedure Code, Section 140.50, was utilized by the trial court. These decisions of New York's highest court were specifically based on the "stop and frisk" decisions of this Court. *Terry* v. *Ohio, supra,* and *Sibron* v. *New York,* 392 U.S. 40 (1968). Thus, one must conclude that the trial court applied the correct standard in weighing the facts at hand.

The trial judge found that the police acted on the basis of their "common law right to inquire." An argument could very well be posited that because petitoner had not been physically grabbed, that no gun had been pointed at him, nor, in fact, was he ever frisked, that this was merely a common law inquiry rather than a "forcible stop." *People* v. *Santiago,* 64 A.D.2d 355, 361 (1st Dept. 1978), *cf. People* v. *Cantor,* 36 N.Y.2d 106 (1975) (where the defendant was encircled by the officers with pointed pistols after they stopped his moving vehicle). However, the instant case does not turn on this issue because even measured against the somewhat higher "reasonable suspicion" standard, urged as controlling by petitioner, the police conduct surely passes constitutional muster.

As noted above, it is quite significant that this is not a "frisk" case. It is a far less intrusive situation. The officers never placed their hands on petitioner's body in any kind of pat down or limited body search. Hence, in evaluating the police conduct in the instant case, this Court need only be concerned with whether the officers were justified in preventing the cab from leaving the scene and requiring petitioner to get out for questioning.

There were several objective, articulable factors which justified this limited seizure of petitioner: (1) the officers had good cause to believe that there had been a serious crime, a shooting, committed in their precinct. *Terry* v. *Ohio, supra.* The information had been furnished by an identifiable person who had been questioned at the scene. The broadcast had come to the officers via their police radio. Thus, rather than acting on the basis of an anonymous tip, they possessed information furnished by a bystander who was available for further questioning and had gotten his information first-hand. *Adams* v. *Williams,* 407 U.S. 143 (1972). Further, the officers were entirely justified in giving credence to a broadcast received over official police channels. *See People* v. *Lypka,* 36 N.Y.2d 210 (1975).

(2) The officers were able to get to 2517 Radcliff Avenue within 20 minutes after the shooting. Once there, they immediately noticed that the vehicle which was the target of their search was parked in front of the three-story building. In fact, if this had been a single unit dwelling the officers would have had probable cause to arrest the occupants. *Hollins* v. *United States,* 338 F.2d 227 (9th Cir. 1964).

(3) Before exiting the house one of the suspects looked up and down the street. This was certainly not a wholly innocent act; rather, it was, from the officer's viewpoint, quite consistent with the conduct of a person who had committed a crime an hour earlier and was checking to see if the "coast was clear." *See People* v. *Ludwig,* 38 N.Y.2d 970 (1976); *People* v. *Samuels,* 68 A.D.2d 663 (1st Dept. 1979).

(4) The men who exited the house fit the limited description provided in the broadcast. *See People* v. *Chest-*

nut, 69 A.D.2d 41, 46 (1st Dept. 1979). From their vantage point, 50 to 60 yards from the building, the three swarthy men looked Hispanic. Certainly, this was the type of conclusion which could have been drawn by the person who saw the car full of men go by during that shooting.

(5) The need to stop petitioner was immediate because he had entered a cab and was apparently soon to exit the scene. They were faced with a situation where failure to take immediate action certainly would have resulted in the escape of all three people.

(6) Further, until the back-up unit arrived, the officers were outnumbered by a group of men whom they believed to be armed and whom they believed to have committed a serious crime only an hour earlier.

Thus, it is quite clear that detaining petitioner and his cohorts was entirely proper. The officer's additional request that petitioner exit the cab is of no real significance because it is well established that this request is at most a minimal intrusion and constitutes reasonable police conduct. *Pennsylvania* v. *Mimms*, 434 U.S. 106 (1977); *People* v. *Diaz*, 41 N.Y.2d 876 (1977). Officer Longo, dealing with a man he suspected possessed a gun, quite prudently and properly requested that appellant exit the cab before speaking with him further.

Finally, petitioner argues that Officer Longo's retrieval of petitioner's coat was unreasonable. This argument makes no sense because it is clear that Longo did not search the coat or the cab; he merely lifted the coat off the seat and uncovered a metal object wrapped in a dishcloth which turned out to be a revolver. Further, the officer tes-

tified that, although he suspected that there was contraband in the coat, he was picking up the coat to recover petitioner's property rather than leave it in the cab which was apparently free to go once petitioner had exited (Longo: 125). The coat was obviously an object of some value and one which petitioner expressed a desire to keep in his possiession (Pace: 36).

We submit that it is clear that the police conduct under these circumstances was eminently justified and, therefore, the fruits of their endeavor was properly held admissible. Further, even if this Court decides that they might have weighed the facts in a different manner, this, of itself, does not in any way mandate review by this Court. *Graver Mfg. Co.* v. *Linde Co., supra* at 275 (1948).

In light of the foregoing, we submit that this Court should decline to review the instant case.

Conclusion

The petition for writ of certiorari should be denied.

Respectfully submitted,

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